Laws and Regulations for Environmental Liability in Real Estate Transaction

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목 차

Ⅰ. Love Canal Incident and Environmental Issues in Real Estate Transaction

Love Canal incident in the mid-1970s and early 1980s sparked a flurry of legislative activity that resulted in becoming so far-reaching that all real estate lawyers of these days must have some familiarity with environmental issues to advise their clients properly.[1] Environmental due diligence is just one aspect of environmental liability risk management, which includes, among other things, environmental impairment insurance, legal compliance audits, contractual risk allocation, and pollution prevention. No longer the exclusive preserve of the environmental activist or the conservationist, environmental

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1) Janet M. Johnson, "For real estate lawyers: a practical guide to identifying and managing potential environmental hazards and conditions affecting commercial real estate", *Real Property, Probate and Trust Journal*, Winter, 1998, at 620.

concerns are a paramount issue for the American business community.2)

Love Canal was an abandoned, unfinished canal built in the 1890s for a failed water power project and was never filled and remained unused until it was acquired in the 1940s by a manufacturing company. From 1946 through 1954, the manufacturing company dumped over 22,000 tons of toxic chemicals into the canal. In 1952, the company donated the entire site to the Niagara Falls School Board, provided the school board continue to allow dumping in the canal until a school was built on the site. The terms of the donation agreement also required the school board to indemnify the company for any claims associated with the canal. The company informed the school board that the dumped materials in the Love Canal itself contained “some chemicals,” but, nonetheless, indicated that the remainder of the site donated to the school board was appropriate for a school and playground. From 1954 until the mid-1970s, as the ground around Love Canal subsided, drums and toxic waste rose to the surface, causing serious health and safety problems. The manufacturing company refused to act, claiming that the canal was the school board’s responsibility. By the late 1970s, toxic waste had migrated into the basements of nearby homes. Conditions were so hazardous to the families living in the area that both the State of New York and President Jimmy Carter declared the Love Canal neighborhood an emergency disaster area. Eventually, over 700 families were relocated; their homes were purchased by the state and federal governments. The condemnation and site remediation costs eventually exceeded $150 million.3)

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2) Joseph Philip Forte, “Environmental due diligence: a guide to liability risk management in commercial realestate transactions”, *Property, Probate and Trust Journal*, Fall, 2007, at 444.

3) Robert E. Hernan, “A State’s Right to Recover Punitive Damages in a Public Nuisance Action: The Love Canal Case Study”, 1 *TOURO ENVTL*. L. J. 45 (1994).

In the aftermath of the Love Canal incident, when public awareness of the problems first became widespread, many state and federal statutes were enacted to force those creating the environmental problems to pay the cleanup costs. New Jersey's Superfund statute was first enacted in the mid-1970s,[4] and the Federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was passed in 1980. Environmental law has evolved into a legal specialty much in demand. The number of environmental consultants has multiplied, and real estate professionals, particularly "dirt lawyers" and brokers, have had to become quasi-environmental law specialists. During this same time, most lenders began drafting more demanding loan clauses and began requiring their borrowers to execute separate environmental indemnity agreements. Much of the impetus for these requirements can be traced to a few court cases holding foreclosing lenders liable for the cleanup of environmental hazards created by their bankrupt borrowers.[5]

As you see, Congress and state legislatures have enacted and continue to enact various types of environmental legislation in response to a perceived need to eliminate, limit, or at least control the deleterious effects that products and byproducts of our industrial society have on all aspects of our environment. Real estate professionals — developers, owners, operators, tenants, lenders, and other investors (individually "investor" and collectively "investors") — and their respective legal counsel are attempting to limit or otherwise allocate their environmental liability by means of transaction structures, documentary

4) New Jersey Environmental Cleanup and Responsibility Act, N.J. STAT. ANNN. § 13:1K-6 to-18 (West 1991) [ECRA]. ECRA was subsequently amended in 1993 by the Industrial Site Recovery Act [ISRA] to prohibit the transfer or closing of an industrial establishment until all contamination on the site was cleaned up.

5) United States v. Fleet Factors Corp., 724 F. Supp. 955 (S.D. Ga. 1988), aff'd, 901 F.2d 1550 (11th Cir. 1990).

provisions, ownership vehicles, third party credit support, indemnification, insurance, and other prophylactic measures.[6)]

Environmental risk to the investor is significantly more serious than the mere loss of investment equity or impairment of realestate value due to non-compliance with ordinary land use statutes. The consequence of an investment in real property by an investor could be an environmental cleanup directive or a judgment far in excess of the investment made or even the value of the realestate or interest acquired. Superfund enforcement is not limited to the Environmental Protection Agency (EPA) or other federal agencies. State governments and private parties who expend funds for cleanup can likewise recover their costs through citizens' suits.[7)] The environmental liability that could result from mere ownership or operation of realestate may be joint and several, perpetual, and unlimited.

Ⅱ. Legislative Approach for Environmental Issues

Environmental laws, whichever it would be Federal, state, and local, often impose complex requirements and severe civil and criminal penalties for failure to comply. Unfortunately, a historical lack of coordination and cooperation among federal, state, and local authorities has fostered confusion, duplication, and conflict among the applicable statutory and regulatory schemes. Although voluminous and growing, state and local statutes reasonably can be identified as falling within four separate categories of legislation: (1) State Superfund laws allowing governmental authorities to order and perform preventive meas-

6) Forte, supra note 2, at 444.

7) 42 U.S.C. § 9607(a)(4) (2000).

ures or cleanup and impose a lien for costs incurred if performed; (2) Similar state Superfund laws permitting (a) imposition of a superlien for cleanup costs that is prior to existing liens on the real property or (b) spreading liens for cleanup costs that attach to other unaffected property of the same owner; (3) Transfer preclearance statutes requiring cleanup before the sale or transfer of property; and (4) Notice laws requiring notice of problems to potential purchasers, specific governmental agencies, and others.

In this ever growing maze of environmental laws, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[8] has had the greatest effect on business and industry in general, and on real estate investment in particular.[9] Upon acquisition of an interest in real property, an investor risks more than mere investment equity and fair market value of the real property. Business costs and liabilities attach to "recognized environmental conditions" including: the cost of compliance with applicable laws, the cost of remediation, business interruption costs, the loss of asset value as a direct result of the environmental condition, the loss of asset value due to market reaction to publicity about a possible or actual environmental condition, liability to third parties, and legal costs associated with litigation.[10] This "recognized environmental conditions" means the presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release

8) 42 U.S.C. §§ 9601-9675 (2000), CERCLA is sometimes referred to as Superfund.

9) CERCLA has been characterized as retroactively imposing strict liability on innocent landowners or operators for acts of property owners, operators, or tenants that were neither illegal nor negligent at the time of their occurrence.

10) ASTM Int'l, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, ASTM Standard E 1527-05 § 1.11 (2005) [hereinafter 2005 Standard].

or a material threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground, groundwater or surface water of the property.[11] Clearly, the economic consequences of a recognized environmental condition could be catastrophic.

CERCLA recognizes three statutory defenses to liability: acts of God, acts of war, and acts or omissions of non-contractual third parties. Although the act or omission of a third party would seem to be a readily available defense to liability, the defense is eliminated if the party asserting the defense has a contractual relationship with the third party (for example, land contract, deed, lease, option, mortgage, easement, etc.) or if the third party is an employee or agent of the party claiming the defense. The person asserting the non-contractual third party defense must exercise due care and take precautions against foreseeable acts or omissions of any such third party. As with the other defenses, there is no guide to what is necessary to qualify for this defense. Acquisition by inheritance or bequest is also a defense to liability in certain circumstances The original CERCLA legislation also contained a secured creditor exemption, which many lenders relied on as their insulation from liability until the federal courts began to limit the usefulness of the defense. In fact, the EPA had promulgated a final rule on the secured creditor exemption,[12] but the Court

11) The term includes hazardous substances or petroleum products even under conditions in compliance with laws. The term is not intended to include de minimis conditions that generally do not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies.

12) Lender Liability under CERCLA, 57 Fed. Reg. 18,344 (Apr. 29, 1992) (to be codified at 40 C.F.R. pt. 300) (stating that a lender does not have to perform any environmental due diligence to qualify for the secured creditor exemption under CERCLA). The EPA also stated in the preamble to the All Appropriate Inquiries Rule that it did not believe that trustees should be held liable solely by virtue of owning trust property.

of Appeals for the District of Columbia vacated that rule.

In October 1986, Congress acknowledged the unfairness of the statutory scheme and amended CERCLA through the Superfund Amendments and Reauthorization Act of 1986 (SARA).[13] SARA provided, among other things, a clarification of the third party defense to allow an investor to defend against liability for the act or omission of a third party even if a contractual relationship did exist, provided the owner or operator claiming the so-called innocent landowner defense demonstrated that it acquired the property after disposal or placement of the hazardous substance; had no part in causing the problem; did not know and had no reason to know of the problem at the time of acquisition; exercised due care with respect to hazardous substances; and took precautions against foreseeable acts or omissions of third parties and the consequences of such acts and omissions. Potentially responsible parties may find relief in two other provisions of SARA. SARA authorizes the government to enter into de minimis settlements with potentially responsible parties if the "settlement involves only a minor portion of the response costs" and meets other criteria.[14] In addition, SARA authorizes the government to enter into covenants not to sue potentially responsible parties in some limited circumstances. For an investor "[t]o establish that [it] had no reason to know" about the hazardous substance, the investor must have "on or before the date on which [it] acquired the facility, ... carried out all appropriate inquiries ... into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices."[15]

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13) Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

14) 42 U.S.C. § 9622(g)(1) (2000).

15) 42 U.S.C § 9601(35)(B) (Supp. IV 2004).

SARA offers five factors for the courts to consider in interpreting the duty to inquire into previous ownership and uses of the property: (1) Any specialized knowledge or experience on the part of the defendant; (2) The relationship of the purchase price to the value of the property if uncontaminated; (3) Commonly known or reasonably ascertainable information about the property; (4) The obviousness of the presence or likely presence of the contamination at the property; (5) "The ability to detect such contamination by appropriate inspection."[16] The ASTM Standard defines obvious as that which is plain or evident; a condition or fact that could not be ignored or overlooked by a reasonable observer while visually or physically observing the property.

Congress further narrowed investor liability with the CERCLA amendments of 1996. In Monarch Tile, Inc. v. City of Florence, 212 F.3d 1219, 1221-22 n.2 (11th Cir. 2000), the court had imposed lender liability based on the capacity to influence the corporation's treatment of hazardous wastes. Therefore, Congress enacted section 9601(F)(i)(II), noting that the term "participate in management" does not equate to "merely having the capacity to influence ... facility operations."[17]

In January 2002, the Small Business Relief and Brownfields Revitalization Act (Brownfields Amendments) amended CERCLA.[18] In addition to clarifying the innocent landowner liability protection, the Brownfields Amendments added protections for contiguous property owners and bona fide prospective purchasers (BFPP).[19] The BFPP provisions provide an unprecedented liability limitation. For the first time, a prospective purchaser who knows a property is contaminated

16) 42 U.S.C. § 9601(35)(B)(i)(A) (2000).

17) 42 U.S.C. § 9601(20)(F)(i)(II) (2000).

18) Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002).

19) 42 U.S.C. § 9607(r)(1) (Supp. IV 2004).

with hazardous substances can avoid liability under CERCLA, provided that the purchaser qualifies as a BFPP. To qualify, the disposal of hazardous substances at the property must predate the acquisition, and the purchaser:

- Must have acquired the property after the January 11, 2002 enactment of the Brownfields Amendments;
- Must have conducted pre-acquisition all appropriate inquiry (AAI) into ownership and uses of the facility in accordance with the new AAI standards;
- Must not be a potentially liable party for response costs at the contaminated site or be affiliated with any party that is; and
- Must take appropriate care with respect to the hazardous substances after acquisition.

As indicated in this section, the BFPP's post-acquisition responsibilities are termed "continuing obligations," and include taking reasonable steps to stop continuing releases; preventing future releases; preventing or limiting human, environmental, or natural resource exposure; providing all legally required notices; cooperating and providing access for authorized response actions; complying with land use restrictions and institutional controls; and complying with any CERCLA information requests or administrative subpoenas. A BFPP may, however, be subject to a "windfall lien" up to the amount of unrecovered costs incurred by the United States in a response action where the cleanup increases the fair market value of the property above that which existed before the response action was initiated. This windfall lien provision effectively limits the EPA's unrecovered response costs (for example, from responsible parties) to the increase in fair market value attributable to the agency's cleanup.

The new contiguous property owner provision protects landowners of property located contiguous to a contaminated site against CERCLA liability. To qualify for the contiguous property owner liability protection, a prospective purchaser of the contiguous property must perform AAI prior to purchasing, as required for BFPP protection. Unlike the BFPP protection, but similar to the innocent landowner liability protection, the results of the contiguous property owner's "all appropriate inquiry" cannot reveal contamination, and the owner must not otherwise know or have reason to know, prior to purchase, that the property is contaminated. When the contiguous property owner later discovers the contamination, such owner is subject to the same continuing obligations applicable to BFPPs.

With regard to the contiguous property owner liability protection, the Brownfields Amendments codify, to a degree, the discretionary "contaminated aquifer" policy that the EPA has used in certain enforcement cases. Although meaningful, the policy does not represent, at least from a practical standpoint, as significant a change in CERCLA liability as the new BFPP protection available to purchasers of contaminated property.

Obviously, investors cannot simply cease investing in real estate altogether to avoid liability for the risks of potentially contaminated property. Owners, developers, sellers, buyers, operators, tenants, lenders, and other investors must accept existing environmental issues as a risk of doing business and attempt to deal with potential liability as with any other market risk. The best protection for investors is to train their real estate professionals to be sensitive to environmental risks in their underwriting and value analyses. Investors then may assess the risk and the probability of liability. They can best manage the risk by conducting the appropriate inquiries into the status of real estate before entering any transaction. The legislative history of SARA indicates that those involved in commercial transactions are to be held to a higher standard of diligence than parties involved in residential transactions Thus, the threshold question for the real estate investment community becomes whether its members have made appropriate inquiry to protect themselves.

Ⅲ. The EPA Rule and ASTM Standards

Active participants included the Mortgage Bankers Association, the American Bankers Association, the Building Owners and Managers Association International, the Real Estate Roundtable (formerly the National Realty Committee), the Multi-Family Housing Council, the International Council of Shopping Centers, the American Council of Life Insurance Companies, the Independent Bankers Association, as well as the American College of Real Estate Lawyers and the Real Property, Probate and Trust Section of the American Bar Association. In late 1989 and early 1990, a substantial number of the national real estate industry and real estate finance industry trade groups gathered to organize and develop an acceptable approach to due diligence to qualify for the innocent landowner defense. This informal, ad hoc effort was a direct response to a serious concern over the lack of certainty and uniformity in the environmental consulting industry’s practices. After considering a proper forum for its discussions and the dissemination of their ultimate product, the informal group decided to work under the auspices of ASTM International (ASTM), formerly the American Society for Testing and Materials. Founded in 1880, ASTM is the largest voluntary standard development system in the world, with 30,000 members in 100 countries. It has over 130 technical committees and has published more than 12,000 standards. Its offices are located in Philadelphia, Pennsylvania.[20] ASTM provides a system for the development of voluntary standards that have undergone a thorough review process. The ASTM staff neither develops nor reviews the technical content of the standards. The volunteer members serving on the ASTM subcommittee formed for a particular project perform the actual work. However, ASTM lends credibility to the standards by ensuring that they are viewed as the product of a broad cross-section of affected interests, including participants from industry and government, consultants, and consumer advocates. ASTM tries to discourage the federal government from prescribing a new standard where an ASTM standard already exists. ASTM also informs regulators when a standard meets the needs of a particular issue for which the regulator has responsibility. In fact, the United States Office of Management and Budget requires that the federal government rely on voluntary standards when possible.[21]

In March 1990, the informal group established the Subcommittee on Environmental Assessment of Commercial Real Estate Transactions (Subcommittee) to develop a due diligence standard for commercial real estate transactions under ASTM. The Subcommittee was later placed under the jurisdiction of a newly formed ASTM Committee on Environmental Assessment. The ASTM Standard defines “commercial real estate” as follows:

Any real property except a dwelling or property with no more than four dwelling units exclusively for residential use (except that a dwelling or property with no more than four dwelling units exclusively for residential use is included in this term [commercial real estate] when it has a commercial function,

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20) http://www.astm.org (last visited May. 17, 2008).

21) Federal Participation in the Development and Use of Voluntary Standards, 47 Fed. Reg. 49,496 (Nov. 1, 1982).

as in the building of such dwellings for profit). This term includes but is not limited to, undeveloped real property and real property used for industrial, retail, office, agricultural, other commercial, medical or educational purposes; property used for residential purposes that has more than four residential dwelling units; and property with no more than four dwelling units for residential use when it has a commercial function, as in the building of such dwellings for profit.

The Standard defines “commercial real estate transaction” as follows: A transfer of title to or possession of real property or receipt of a security interest in real property, except that it does not include transfer of title to or possession of real property or the receipt of a security interest in real property with respect to an individual dwelling or building containing fewer than five dwelling units, nor does it include the purchase of a lot or lots to construct a dwelling for occupancy by a purchaser, but a commercial real estate transaction does include real property purchased or leased by persons or entities in the business of building or developing dwelling units.[22)]

The proposed scope of the Subcommittee was the promotion of knowledge, stimulation of research, and development of standard guides, specifications, practices, test methods, classifications, and definitions relating to environmental assessment. The scope includes, but is not limited to, commercial real estate transactions, storage tanks, and pollution prevention. One objective of the Subcommittee is to establish good commercial practices that satisfy the due diligence responsibilities of landowners. At its initial meeting, the sub-committee adopted the following statement: The Subcommittee will attempt to prepare a standard or standards for commercial real estate transactions (1) to define

22) ASTM Standard E 1527-05.

the practices necessary to qualify for the innocent landowner defense to Federal Superfund liability and (2) to outline prudent business practices for the environmental assessment of properties that are the subject of commercial real estate transactions.

A commercial real estate transaction is defined as a transfer of title to or possession of real property or receipt of a security interest in real property when the real property is intended to be used for revenue generating purposes. It is intended that multifamily properties will be specifically addressed, and it is likely that some provisions may apply only to certain property types. It is recognized that ASTM has no authority to make any standards mandatory, either by legislation or regulation, and thus it is intended that the standard or standards to be developed will be voluntary. In addition, the Subcommittee may prepare procedures, guidance and criteria to certify the environmental condition of real property that is the subject of commercial real estate transactions for purposes of the federal Superfund law and other laws, including state and common law requirements. It is hoped that the Subcommittee will recommend means by which subsequent holders of title, possessory or security interests may rely on previous environmental assessments or certifications in order to avoid duplicative due diligence practices. Objectives that will guide the development of these standards are (1) to ensure the efficiency and integrity of commercial real estate transactions, (2) to facilitate compliance with applicable governmental requirements for environmental protection, (3) to improve the quality of environmental assessments, (4) to clarify the legal responsibilities associated with commercial real estate transactions, and (5) to ensure that the standard of inquiry is practical and reasonable.

At the outset, the Subcommittee limited the project to commercial (including multifamily) transactions, CERCLA contaminants (as well as petroleum, which is customarily included in due diligence), and the memorializing of "good current commercial or customary practice." The Subcommittee did not intend the project to alter current industry practices.[23)]

The Subcommittee, which had more than 400 members, represented a balance of users (owners, lenders, etc.) and producers (the environmental industry). Its members are national, regional, and local environmental companies; real estate owners; chemical, oil, and other major industrial concerns; large and small lenders; national and regional real estate industry trade associations; national professional associations; government organizations (including Resolution Trust Corporation, FDIC, Department of Defense, and EPA); and quasi-government organizations (Fannie Mae and Freddie Mac). The primary leaders of the Subcommittee and its sections are representatives of the lending and real estate finance investment community and the liaisons from the American College of Real Estate Lawyers and the Real Property, Probate and Trust Section of the American Bar Association. ASTM rules govern the Subcommittee activities. The Subcommittee is fully democratic. For example, all votes require super majorities, and all negative ballots must be considered before balloting continues. To ensure that the Standard is representative of current practices, the ASTM rules require that, after adoption, a standard be reviewed periodically to incorporate developing industry practices and other changes. After the Standard was final, the Subcommittee considered other standards for an asbestos assessment, intrusive testing practices (Phase II), as well as several other projects.

In March 1993, ASTM adopted the Standard for Environmental Assessments for Commercial Real Estate (1993 Standard). The 1993 Standard was the

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23) 42 U.S.C. § 9601(35)(B)(i)(1) (Supp.IV 2004).

result of a lengthy process of negotiation and compromise among the members of the Subcommittee to arrive at a consensus acceptable to the ASTM membership. The 1993 Standard consists of two separate but interrelated Practices: *the Environmental Site Assessments*: *Phase I Environmental Site Assessment Process* (*Phase I*)[24] and *the Environmental Site Assessments*: *Transaction Screen Process* (*Transaction Screen Process*),[25] each individually a "Practice." The 1993 Standard recognized several significant principles about good commercial or customary practice of the real estate industry. As appropriate inquiry, due diligence can only reduce risk (but cannot eliminate it with certainty); must be practical and within the time and cost constraints of actual transactions; cannot be an exhaustive analysis of a clean property; must allow for a range of approaches to different properties; is the result of the application of professional judgments and not simply a mechanical process; and is subject to practical cost-benefit questions balancing the value of results against increases in cost.

The 1993 Standard and subsequent revised Standards (Standards) are designed for voluntary use as appropriate inquiry under CERCLA[26] and meant to "reflect a commercially prudent and reasonable inquiry." The 1993 Standard acknowledges that different degrees of inquiry may be appropriate in particular circumstances and that no implication is intended that a person must use the Standard in order to be deemed to have conducted inquiry in a commercially prudent or reasonable manner in any particular transaction. Thus, the Standards

24) ASTM Int'l, Standard Practice for Environmental Assessments: Phase I Environmental Site Assessment Process, ASTM Standard E 1527-93 (1993).

25) ASTM Int'l, Standard Practice for Limited Environmental Due Diligence: Transaction Screen Process, ASTM Standard E 1528-93 (1993).

26) ASTM Int'l, Standard Practice for Environmental Assessments: Phase I Environmental Site Assessment Process, ASTM Standard E 1527-00 § 1.1 (2000).

confirm due diligence as a process of incremental inquiry--from the basic to the comprehensive--as deemed appropriate. As designed, the Standards permit an investor to commence due diligence by conducting a Transaction Screen level of inquiry or by proceeding directly to the Phase I site assessment level. The legal basis for the Standards is set forth in the Legal Background Report of the legal section of the Subcommittee.

In 2000, the 1993 Standard was revised and superceded by ASTM 1527-00. Then, on January 11, 2002, Congress adopted the Brownfields Amendments to CERCLA and directed the EPA to promulgate a new standard for environmental due diligence. At that time, the ASTM 1527-00 Standard, widely used for environmental due diligence, was adopted as an interim standard, pending approval of regulations by EPA. Under the interim Standard, after May 31, 1997, all purchasers of property were required to conduct a Phase I environmental site assessment (and Phase II investigations, if appropriate) to take advantage of the CERCLA defenses.[27)]

Following the Brownfields Amendments, on November 1, 2005 the EPA published a new rule defining all appropriate inquiries a party may undertake when considering the potential purchase of a piece of land (AAI Rule). The AAI Rule is significant because it codifies, for the first time, the specific environmental site assessment procedures that an investor must follow to meet the due diligence requirements of the innocent landowner defense and the Brownfields grants. The ASTM due diligence guidelines were also adapted to conform to the new AAI rules, resulting in the ASTM 1527-05 standard (2005 Standard). The EPA has approved the 2005 Standard as sufficient to meet the demands of the AAI Rule. To preserve the right to claim the available

27) R.E. Goodson Constr. Co. v. Int'l Paper Co., No. 4:02-4184-RBH, 2006 WL 1677136, at 4 (D.S.C. June 14, 2006).

statutory defenses to a CERCLA enforcement action, a prospective purchaser must perform AAI. Also, any party pursuing a grant under the EPA's Brownfields Grants program to assess and characterize a property must perform AAI based on the new rule.[28)]

The AAI Rule went into effect on November 1, 2006. Prior to the effective date of the AAI Rule, the interim Standard remained in effect. However, even if they entered into a purchase agreement prior to the effective date, prospective purchasers that closed on or after November 1, 2006 who desired to receive the innocent landowner protections should have conducted AAI according to the new standards.[29)] Note that both the AAI Rule and the 2005 Standard are voluntary standards. The AAI Rule specifically states that it applies to a limited group of persons: those seeking to qualify for the innocent landowner, bona fide prospective purchaser, contiguous property owner defenses, or for a Brownfields grant. The AAI Rule and the 2005 Standard do not bind any other individuals conducting environmental due diligence.[30)]

However, the drafters of the 2005 Standard foresaw broad usage of the new rules: "This practice is designed to assist the user in developing information about the environmental condition of a property and as such has utility for a wide range of persons, including those who may have no actual or potential CERCLA liability ...." Indeed, even though the effective date was November 1, 2006, some environmental consultants had already begun to implement the AAI Rule, while other consultants who were not yet utilizing the full 2005 Standard appeared to have adopted language from it in their Phase

28) Standards and Practices for All Appropriate Inquiries, 70 Fed. Reg. 66,070 (Nov. 1, 2005) (to be codified at 40 C.F.R. pt. 312).

29) Forte, supra note 2, at 459.

30) ASTM Standard E 1527-05, § 4.2.1.

I reports. Given the broad acceptance of the 2000 Standard and the comprehensive nature of the AAI Rule and 2005 Standard, it is expected that a substantial part of the investment community will require use of the new standards for environmental due diligence. At the same time, the AAI Rule and 2005 Standard may not be appropriate for all environmental diligence, such as in foreign transactions, and an investor should carefully consider the necessary scope and intended use of the Phase I due diligence before selecting the relevant standard for the report.[31)]

Ⅳ. Conclusion

Environmental issues in real estate transactions are quite common. Real estate lawyers must be familiar with these issues and be able to counsel their clients as to the need for and purposes of Phase I Assessments in any potential transactions. Environmental laws and regulations begin with appropriate inquiry upon the acquisition of the property.[32)] As one component of such environmental due diligence inquiry, the EPA has published a new rule defining all appropriate inquiries a party must undertake in order to qualify for certain CERCLA defenses and Brownfields grants. The purpose of ASTM due diligence guidelines was also to conform to the new AAI Rule, resulting in the ASTM 1527-05 standard. The AAI Rule and 2005 Standard are voluntary standards that attempt to provide a comprehensive approach to Phase I reporting. These new standards require greater expertise, a more exhaustive review of data, and heightened accountability from environ-

31) Forte, supra note 2, at 460.

32) Johnson, supra note 1, at 463.

mental consultants when identifying environmental conditions on properties.[33)]

Although the approaches to, and components of, environmental risk management may be viewed as susceptible to categorization and standardization, the purposes and uses of environmental risk management tools available to the real estate industry in the marketplace will continue to be as diverse and varied as the needs and risk-taking appetites of investors. CERCLA liability aside, each party to a transaction will approach and use the information gathered in the due diligence process to fulfill its respective business agenda within the larger context of its business judgment regarding, and its appetite for, risk.

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33) Forte, supra note 2, at 489.

[국문초록]

미국 부동산 거래의 환경 위험에 대한 법률

이 재 경*

1. 부동산 거래에서 환경적 위험 요소의 등장 - Love Canal 사건

미국의 경우, 1970년대와 1980년대에 걸쳐 발생한 Love Canal 사건으로 인하여 환경과 관련된 입법이 본격적으로 등장하게 됨에 따라, 부동산 거래 전문 변호사들은 과거와는 달리 환경에 대한 자문까지도 필요로 하게 되었다. 이에 따라, 환경과 관련된 내용은 더 이상 환경론자 등만의 전유물이 아니라, 환경 관련 보험, 환경 준수 회계, 오염 방지의무 등 환경 관련 자산 실사는 환경과 관련된 부동산 거래상 위험관리의 주요한 부분을 차지하게 된 것이다. 1970년대 중반 이후 뉴저지 주(州)의 수퍼펀드 법령의 제정을 비롯하여, 「연방환경기본법」(CERCLA; Federal Comprehensive Environmental Response Compensation and Liability Act)이 1980년대에 통과된 이후에, 많은 주 또는 연방 법률은 환경 유지 및 오염 제거에 따른 비용이 소요되는 방향으로 법률이 제정되었다. 이에 따라, 환경과 관련된 컨설턴트가 새롭게 등장하게 되었고, 부동산거래 업무에 종사하는 전문가들, 특히 변호사들은 준(準) 환경전문가로서 무장해야 하는 상황이 벌어진 것이다.

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2. 환경적 위험 요소에 대한 입법적인 접근 (EPA 규정 및 ASTM 기준)

연방 또는 주 법률을 막론하고, 환경 관련 법률은 복잡한 요구사항 및 위반사항에 대한 엄중한 제재로 이루어져 있다. 연방 및 주 등의 세부적인 법률은 ① 주 정부의 환경 보수비용에 대한 예방조치를 명령하고, 그러한 환경 관련 비용에 대한 우선적 담보권을 설정할 수 있는 수퍼펀드법률, ② 기존 담보권에 우선하는 환경 보수용의 담보권을 설정하거나, 동일 소유자의 다른 부동산에 담보권의 효력을 확장시킬 수 있는 법률, ③ 부동산의 매매 이전에 환경 보수비용의 납부 의무를 부과하는 법률, ④ 매매 상대방 및 담당 관청에게 환경 관련 고지의무를 부과하는 법률 등으로 구분된다. 이러한 환경 관련 사항에 대한 기본적인 내용을 담고 있는「연방환경기본법」은 부동산거래에 있어 많은 영향을 끼치게 되었던바, 이후 부동산 거래 당사자들은 환경 법률의 준수에 소요되는 각종 비용까지도 부동산 가치 평가에 포함시키게 된 것이다.

100개 국의 30,000회원으로 구성된 자발적인 규격협회인 ASTM (American Society for Testing and Materials)는 부동산거래에 있어 환경 관련 실사기준을 제정하여 이러한 내용이「연방환경기본법」등의 기초적인 입법과정에 반영되도록 영향력을 발휘하고 있다. 그런데 해당 법률 등에 상업적인 부동산거래(commercial real estate transaction)을 4개의 거주단위가 거주하는 부동산의 거래를 포함시키는 것으로 기본적으로 정의함에 따라, 상당수의 부동산거래가 환경 요소에 따른 자산 실사기준에 포함되었다. 그리하여, 미국 환경부 EPA(Environmental Protection Agency)는「연방환경기본법」의 이러한 기준에 대한 세칙을 정하였고, 결국 이러한 세칙에 따른 부동산거래 및 그에 따른 자산실사가 이루어지는 것이다. 2002년 선량한 매수자에 대한 보호 규정을 추가한 Brownfields 개정안(Small Business Relief and Brownfields Revitalization Act)이 환경기본법에 반영함에 따라, 2005년 EPA는 새로운 세칙을 정하게 되었으며,

기존의 1993년 기준에 따라 자산실사에 대한 기준안을 제시하였던 ASTM도 2005년도 기준을 새롭게 제정하게 되었다. 본 원고에서는 미국 환경 입법의 역사적인 흐름 및 각종 법안 및 기준의 기본적인 내용을 살펴보고, 우리나라 환경 관련 입법에서의 유추적용 및 채택 여부를 고찰함으로써 부동산거래의 또 다른 고려요소를 파악하고자 한다.

주제어 : 민법, 부동산, 환경법, 환경, 부동산 거래, 환경 위험, 자산실사, Love Canal, 연방환경기본법, EPA, ASTM, Brownfields 개정안